# INDEX

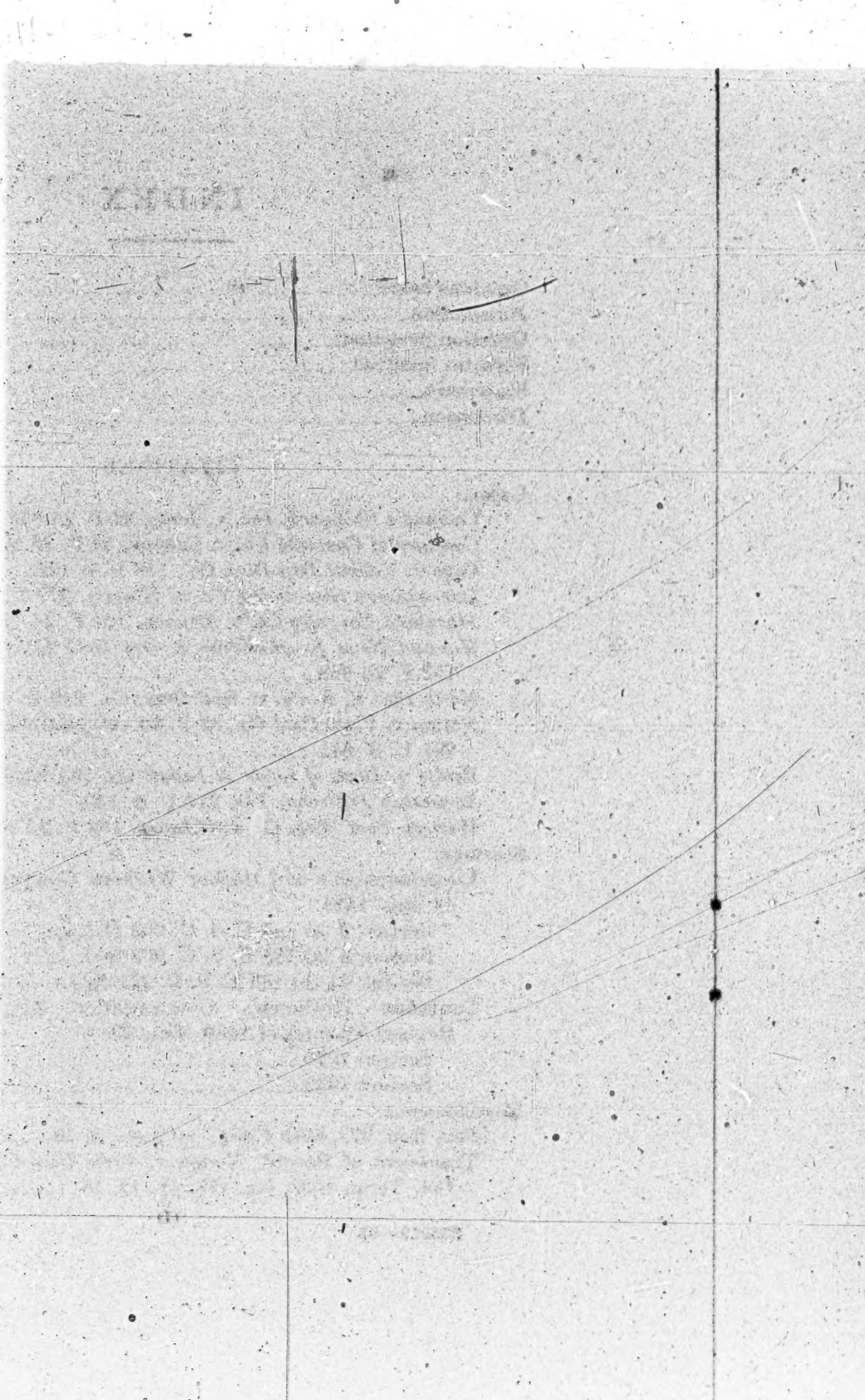

| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 3 |
| Discussion | 5 |


## CITATIONS


| | |
|---|---|
| **Cases:** | |
| *Colonna's Shipyard, Inc.* v. *Lowe*, 22 F. 2d 843 | 7 |
| *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802 | 6, 7 |
| *Cope* v. *Vallette Dry Dock Co.*, 119 U. S. 625 | 5 |
| *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 | 5 |
| *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732 | 6, 7, 8 |
| *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 | 7 |
| *North Pac. S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119 | 5, 6 |
| *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165, certiorari dismissed, 291 U. S. 641 | 6, 7, 8 |
| *Rohlfs* v. *Dept. of Labor & Industries*, 190 Wash. 566 | 7 |
| *Steamship Jefferson, The*, 215 U. S. 130 | 5 |
| *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 | 5, 7, 8 |
| **Statutes:** | |
| Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424: | |
| Section 2 (4) (33 U. S. C. 902 (4)) | 2 |
| Section 3 (a) (33 U. S. C. 903 (a)) | 2 |
| Section 21 (b) (33 U. S. C. 921 (b)) | 4 |
| Louisiana Workmen's Compensation Act, Louisiana Revised Statutes of 1950, Title 23: | |
| Section 1031 | 3 |
| Section 1035 | 3 |
| **Miscellaneous:** | |
| Sen. Rep. 973, 69th Cong., 1st sess., p. 16 | 6 |
| Transcript of Record, *Norton* v. *Vesta Coal Co.*, Sup. Ct., Oct. Term, 1933, No. 178, pp. 12, 16 | 8 |




255919—53



# In the Supreme Court of the United States

OCTOBER TERM, 1952

---

No. 744

AVONDALE MARINE WAYS, INC., PETITIONER

*v.*

JOSEPH H. HENDERSON, DEPUTY COMMISSIONER, MRS. VIOLA CAMPBELL, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## MEMORANDUM FOR RESPONDENT DEPUTY COMMISSIONER

---

### OPINIONS BELOW

No opinion was written by the District Court for the Eastern District of Louisiana. The opinion of the Court of Appeals for the Fifth Circuit (R. 125–7) is reported at 201 F. 2d 437.

### JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1953 (R. 128). The petition for a writ of certiorari was filed April 24, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTION PRESENTED

Whether the death of employees of a marine repair yard from an explosion, while they were cleaning inside a tank of a barge hauled out of the Mississippi River on the cradle of a marine railway, occurred "upon the navigable waters of the United States (including any dry dock)," so that compensation under the Longshoremen's and Harbor Workers' Compensation Act might be paid.

## STATUTES INVOLVED

Section 3 (a) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 1426 (33 U. S. C. 903 (a)) provides in pertinent part as follows:

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

Section 2 (4) of the same Act, 44 Stat. 1425 (33 U. S. C. 902 (4)) provides:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

The Louisiana Workmen's Compensation Act, Louisiana Revised Statutes of 1950, Title 23, §§ 1031 and 1035, provides in pertinent part:

> Section 1031. If an employee not otherwise eliminated from the benefits of this Chapter, receives personal injury by accident arising out of and in the course of his employment, his employer shall pay compensation in the amounts, on the conditions, and to the person or persons hereafter designated.
>
> * * * * *
>
> Section 1035. The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, business and occupations.
>
> The operation, construction, repairs, removal, maintenance and demolition of railways and railroads, vessels, boats, and other water crafts, terminal docks, * * *.

## STATEMENT

On August 20, 1951, Arthur Campbell and Joseph D'Arensbourg, two laborers, were killed by a flash explosion. The men had been cleaning inside a tank of a barge (R. 80) which was then at petitioner's marine repair yard on a cradle upon its marine railway whose submerged tracks extended into the Mississippi River at Avondale,

Louisiana.[1] The barge was above ground about 300–350 feet from the water (R. 58–59, 70), and some hours before the explosion had been hauled on the marine railway to have its tanks cleaned and its bottom painted (R. 32, 72). The repair work was of short duration and did not require the barge to be rolled off the railway (R. 66–67).

After a formal hearing, the Deputy Commissioner made a compensation order and award in favor of Campbell's widow and nine children, crediting the death benefits paid under the Louisiana Workmen's Compensation Act (R. 10–18). Petitioner, deceased's employer, brought suit in equity in the District Court under Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 921 (b)) to enjoin enforcement of the award on the ground that death did not occur "upon the navigable waters of the United States (including any dry dock)" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act (R. 4–9). The District Court granted summary judgment upholding the Deputy Commissioner's awards, citing two earlier decisions of the Court of Appeals (R. 115–116). On appeal, the Court of Appeals, one judge dissenting, upheld the dismissal of the suit (R. 125–127).

---

[1] The cradle of a marine railway is on wheels and rests upon tracks. When a vessel is to be raised from the water, the cradle is lowered into the water and the vessel is floated onto the cradle, where it comes to rest. The cradle is then hauled along the tracks.

## DISCUSSION

The petition presents only the question whether for the purposes of compensation under the Longshoremen's and Harbor Workers' Compensation Act a marine railway, functionally indistinguishable from a dry dock, may be regarded as a dry dock. Consistency, continuity of coverage, and avoidance of a multiplicity of nice questions are promoted by the decision below. It attains uniformity of protection for the same hazards in doing the same work, regardless of minute distinctions,[2] where the injury or death occurs in what is admitted to be essentially maritime employment. *North Pac. S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119; *The Steamship Jefferson*, 215 U. S. 130, 141–2; *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409, 413 (C. A. 9); cf. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52.

The evidence in this record establishes that a marine railway is used for the same general purposes as a floating drydock or graven drydock (R. 74–75; 89–90). A drydock is a structure designed to take vessels out of the water for repair (cf. *Cope* v. *Vallette Dry Dock Co.*, 119 U. S. 625, 627), and while the mechanism for performing this service may vary, the operation

---

[2] *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 (C. A. 9), dismissed as "adventitious" the fact that the stern of the vessel undergoing repair on a marine railway was partially submerged in navigable waters at high tide, but held that the Act was applicable to a marine railway.

is essentially the same.[3] To consider a marine railway as a drydock is supported by usage[4] and effectuates the purpose of the Act, "to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and *repairing* ships." (Italics supplied.) (Sen. Rep. 973, 69th Cong., 1st sess., p. 16). As the Fifth Circuit pointed out in an earlier case (*Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, 805):

> * * * it was not the intention of Congress to provide compensation for harbor workers only while they were working on ships that had been placed on floating or graven docks and to deny compensation if the same employees happened to be repairing a vessel on a marine railway. Such workmen might have been engaged on the same day in all three classes of work, since it is not unusual in a large

---

[3] The types of docks are described in *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732 (C. A. 5), and *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165 (C. A. 3), at 167, where Judge Woolley, dissenting, observes that after the vessel is lifted and "is left standing high and dry * * * work on the vessel is in each case of the same maritime character, involving the same hazards and calling for the same compensation."

[4] See *North Pac. S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, 123. For use of the term "drydock" to include a marine railway, cf. *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, 733–34 (C. A. 5). The employer in the *Maryland Casualty Co.* case, although operating a marine railway, called itself United Dry Dock, 101 F. 2d at 734.

shipyard for employers to use all three methods of taking ships out of the water for the purpose of repairing them during the same day or even at the same time.

The Fifth Circuit in *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, and *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, has previously held that a marine railway is a drydock within the meaning of the Act; that in nautical parlance, "drydock", "floating dock", and "marine railway" are interchangeable terms (101 F. 2d 732 at 733); and that "it must be presumed that Congress intended to protect the great majority of laborers employed on floating docks and marine railways as well as the comparatively few workmen employed on what are to be technically considered dry docks" (101 F. 2d at 734). The same result was reached by the Ninth Circuit in *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409, where identical contentions were raised and compensation under the state law had also been paid. See also *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C. A. 4).

*Norton* v. *Vesta Coal Co.*, 63 F. 2d 165 (C. A. 3), writ of certiorari dismissed, 291 U. S. 641, the earliest opinion on the classification of a marine railway by a Court of Appeals,* does hold the other way, and in this Court Government

---

*It was preceded by *Colonna's Shipyard, Inc.* v. *Lowe*, 22 F. 2d 843 (E. D. Va.) and followed by *Rohlfs* v. *Dept. of Labor & Industries*, 190 Wash. 566.

counsel did adopt the Third Circuit's view, after first obtaining a grant of certiorari to review the decision. 291 U. S. 641. But the judgment may not be technically in conflict, for after the vessel had been raised from the river, the cradles of the railway were removed and the vessel was blocked up,[4] whereas here the barge rested on the cradle of the marine railway (R. 66–67). In any event, it should be pointed out that the view expressed by Government counsel in the *Vesta Coal Co.* case was not that of the Employees' Compensation Commission (now the Bureau of Employees' Compensation) either before that decision[5] or since, and it has not been followed by the administrative agency or the Department of Justice.[6] We believe the reasoning of the majority of the Third Circuit in that case to be unsound, and that the dissent interpreting the phrase "*any* dry-

---

[4] The opinion of the Court of Appeals so states. See also Transcript of Record, *Norton* v. *Vesta Coal Company*, Sup. Ct., October Term, 1933, No. 178, pp. 12, 16.

[5] The Government's brief noted (p. 5) that the Commission, "which by Section 39 of the Act is charged with its administration and authorized 'to make such rules and regulations * * * as may be necessary in the administration of this Act,' has provided by a regulation which has been in effect since the passage of the Act in 1927 that a marine railway is a dry dock."

[6] *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732 (C. A. 5) and *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 (C. A. 9), as well as the instant case, attest that the administrative agency and the Department of Justice have not acquiesced in the opinion of the Third Circuit in the twenty years since its rendition.

dock[2]' [italics supplied] as one of enlargement has correctly held the field.

Respectfully submitted.

ROBERT L. STERN,
*Acting Solicitor General.*
WARREN E. BURGER,
*Assistant Attorney General,*
HUBERT H. MARGOLIES,
PAUL A. SWEENEY,
*Attorneys.*

MAY 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953